

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4293

Appeal MA20-00205

City of Niagara Falls

November 30, 2022

Summary: The appellant made a request to the city for access to information about him discussed in closed meetings of council. The city located responsive records and issued a decision granting partial access. The city denied access to the remaining records on the basis that they were exempt under section 38(a) (discretion to deny access to requester's own information), read with sections 6(1)(b) (closed meeting), 7 (advice or recommendations), and 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the city's decision and challenged the reasonableness of the city's search for responsive records. In this order, the adjudicator upholds the city's decision in part. The adjudicator orders the city to disclose the information she finds is not exempt and upholds the city's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 6(1)(b), 7, 12, 17 and 38(a).

OVERVIEW:

[1] This appeal is about a request the appellant made to the City of Niagara Falls (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information about him discussed in closed meetings of council. The request is for access to the following:

[part 1] I am continuing with the same 4 Request; as Jan. 11, 2011, Dec. 9, 2011, July 30, 2012, and March 19, 2014 Requests paid by me and my wife, the requests. Attached - PAGES 7.

[part 2] I am requesting in accordance to the (MFIPPA) any, all records of the "[appellant's surname] Matter" discussed by the City of Niagara Falls, City Council behind close-doors Illegal meetings on Oct. 3, 2011, Dec. 12, 2011 and Jan. 24, 2012.

[part 3] In addition to any information regarding the 2 prohibitions issued against [appellant's name] and filed with the N.R.P.¹ on Dec. 13, 2004 at: 10:40, AM. - And on June 5, 2008 at: 11:50, AM.

[2] The city issued a decision stating that it would not process the request because it was frivolous and vexatious pursuant to section 4(1)(b) of the *Act*.

[3] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC). The parties participated in mediation to explore the possibility of resolution.

[4] During mediation, the appellant stated that he was seeking access to any documents that contained reasons that the city instituted "bans" (trespass notices) against him that he said prohibited him from entering city-owned facilities. He also requested the minutes of any meetings that referenced certain of his matters with the city.²

[5] In response, the city issued a revised decision granting partial access to responsive records. With respect to part 1 of the appellant's request, the city wrote that it had responded previously with decisions in response to four prior requests that the appellant submitted,³ either granting or denying access. The city also wrote that the current request was not properly a request for continuing access because it was not for access to documents produced on an ongoing basis, but rather for documents created only once.

[6] With respect to part 2 of the request, the city wrote that it had located responsive records for council meetings held on the three dates specified in the request – October 3 and December 12, 2011, and January 24, 2012 – but that those records are exempt under section 6(1)(b) (closed meeting) of *MFIPPA* because the meetings were held in the absence of the public in accordance with section 239(2) of the *Municipal Act, 2001*.⁴ The city also claimed the exemptions in sections 7(1) (advice or

¹ Niagara Regional Police.

² The appellant, a former employee, engaged in legal proceedings with the city following the termination of his employment.

³ Between 2012 and 2014.

⁴ S.O. 2001, c. 25.

recommendations) and 12 (solicitor-client privilege) of *MFIPPA* over these records.

[7] Finally, with respect to part 3 of the request ("prohibitions" issued against the appellant and filed with the Niagara Regional Police), the city wrote that it had located and granted access to six responsive records.

[8] After receiving the records disclosed with the city's revised decision, the appellant informed the mediator that he believes that they are not responsive to his request. The appellant maintained that he seeks access to information that would explain why the city was permitted to file what he described as unjust and unconstitutional prohibitions (the trespass notices) against him from December 13, 2004 onwards, that he says prevented him from accessing city facilities. The appellant stated that he seeks access to the minutes of all meetings in which his name was mentioned, as well as the process used by the city to issue a trespass notice or order against him. He requested a meeting with current and/or former city council members to discuss what he says was wrongdoing against him, and potential compensation.

[9] The city responded with a letter answering the appellant's questions and granting access in full to additional responsive records.

[10] The appellant stated that he wished to proceed to adjudication to obtain access to the responsive records withheld by the city, and on the basis that additional responsive records exist that the city has not disclosed. As a result, the reasonableness of the city's search for responsive records was added as an issue to this appeal.

[11] Also during mediation, the city withdrew its claim that the request is frivolous or vexatious. Section 4(1)(b) was therefore removed as an issue and is not before me in this appeal.

[12] With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I conducted an inquiry during which I received representations from the appellant and the city.

[13] In this order, I find that records 1, 3, 5 and 7 are exempt under section 38(a), read with section 6(1)(b) (closed meeting) of the *Act*. I uphold the city's exercise of discretion to deny access to records 1, 3, 5 and 7. However, I find that records 2, 4 and 6 are not exempt under section 38(a), either with reference to section 6(1)(b), 7 or 12, or as applicable under sections 6(1)(b), 7 or 12 alone. I order the city to disclose records 2, 4 and 6 to the appellant. I also uphold the city's search for responsive records as reasonable.

RECORDS:

[14] There are 10 pages of records at issue, consisting of meeting minutes, reports

and motions and resolutions. I have identified them as follows, based on the page numbers provided by the city:

Record number	Page number(s)	Description
1	1	Recommendation made during <i>in camera</i> meeting on October 3, 2011
2	2	Internal report from the chief administrative officer to mayor and councillors announcing October 3, 2011 <i>in camera</i> motion
3	3	Internal email to council regarding October 3, 2011 <i>in camera</i> meeting
4	4	December 12, 2011 resolution to conduct <i>in camera</i> meeting
5	5	Excerpt from <i>in camera</i> recommendation (excerpted from record 1, above)
6	6	January 24, 2012 resolution to conduct <i>in camera</i> meeting
7	7-10	Internal report from human resources director to mayor and councillors regarding <i>in camera</i> meeting held on December 12, 2011 with results of <i>in camera</i> motion attached

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of *MFIPPA*, and if so, whose personal information is it?
- B. Do the discretionary exemptions in sections 38(a) and/or 6(1)(b) (closed meeting) apply to the records?
- C. Do the discretionary exemptions in sections 38(a) and/or 7(1) (advice or recommendations) apply to the records?

- D. Do the discretionary exemptions in sections 38(a) and/or 12 (solicitor-client privilege) apply to the records?
- E. Should the city's exercise of discretion under section 38(a) be upheld?
- F. Should the city's search for responsive records be upheld?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) of *MFIPPA* and, if so, whose personal information is it?

[15] The city has denied access to the records claiming that they are exempt under section 38(a), read with the closed meeting exemption in section 6(1)(b), the advice or recommendations exemption in section 7(1), and the solicitor-client privilege exemption in section 12.⁵ In order to decide whether these exemptions apply to the records, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[16] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.⁶

[17] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.⁷

[18] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁸

[19] Section 2(1) of the *Act* gives a list of examples of personal information. The examples relevant to this appeal are set out below:

"personal information" means recorded information about an identifiable individual, including,

⁵ The city applied the stated exemptions to all the records.

⁶ The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps.

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

(e) the personal opinions or views of the individual except if they relate to another individual,

...

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[20] Sections 2(2.1) and (2.2) distinguish personal information from information about an individual in a business or professional capacity. Section 2(2.1) states that:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[21] To qualify as personal information, the information must be about the individual in a personal capacity. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.⁹

[22] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."¹⁰

[23] It is important to know whose personal information is in the record. If a record contains the requester's own personal information, their access rights are greater than if it does not.¹¹

⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁰ Order 11.

¹¹ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies. Also, if a record contains the personal information of other individuals, one of the personal privacy exemptions may apply (section 38(b)). In

Representations

The city's representations

[24] The city submits that the records contain information relating to the appellant's employment history, and another individual's views or opinions about the appellant. The city also says that the records contain the appellant's name as it appears with other personal information about him, such that disclosure of the appellant's name would reveal other personal information about him. The city submits that this is the appellant's personal information as contemplated by paragraphs (b), (e), (g) and (h) of section 2(1) of the *Act*.

The appellant's representations

[25] The appellant submits that the records contain his personal information because they name him and contain information about his employment history and alleged behaviour.

Analysis and findings

[26] I have reviewed the records and the parties' representations and find that records 1, 2, 3, 5 and 7 contain only the appellant's personal information. These records contain information about the termination of the appellant's employment, about trespass notices issued against the appellant, and discussions about security concerns relating to the appellant. I find that this qualifies as personal information that falls under paragraphs (b), (e) and (g) of the definition of "personal information" in section 2(1) of the *Act*.

[27] I also find that records 1, 2, 3, 5 and 7 contain the appellant's full and/or surname. I find that disclosure of the appellant's name, even if only his surname as it appears in some of the records at issue, would reveal something of a personal nature about him relating to his interactions with the city and that this is therefore the appellant's personal information as defined in paragraph (h) of section 2(1).

[28] Based on my review, however, I find that records 4 and 6 do not contain personal information belonging to the appellant or to any other identifiable individual. Records 4 and 6 are resolutions adopted by council announcing closed meetings to take place. The resolutions refer to sections of the Municipal Act, 2001 to describe the matters to be discussed in camera. They do not identify or refer to the appellant or any other identifiable individual in a personal capacity. Rather, they identify the moving and seconding councillors, and the mayor and city clerk.

[29] The city did not argue that the information about municipal councillors, the

this order, I find that the records do not contain the personal information of identifiable individuals other than the appellant.

mayor or city clerk is personal information. I have nevertheless considered this and find, based on my review of records 4 and 6, that this is not personal information of elected officials or the city clerk who signed the resolutions because they were acting in a professional capacity when considering matters in meetings of council.

Issue B: Do the discretionary exemptions in sections 38(a) and/or 6(1)(b) (closed meeting) apply to the records?

[30] The city claims that the records are exempt under section 38(a), read with sections 6(1)(b), 7 and/or 12. I will first consider whether the records are exempt under the discretionary exemption for closed meetings at section 6(1)(b) on its own, or as read with section 38(a).

[31] In my discussion of "personal information," above, I found that records 4 and 6 do not contain the appellant's personal information, but that records 1, 2, 3, 5 and 7 do. This latter finding makes section 38(a) of the *Act* relevant to my analysis about these records. Under section 36(1), the appellant is given a general right of access to his own personal information held by the city. Section 38 sets out certain exemptions from this right. Section 38(a) states that:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) if section 6, 7 [or] 12...would apply to the disclosure of that personal information.

[32] Because of my findings about personal information, I must review records 4 and 6 under section 6(1)(b), but I must consider the application of section 6(1)(b), 7 and 12 to records 1, 2, 3, 5 and 7 through the lens of section 38(a).

Section 6(1)(b): closed meeting

[33] According to section 6(1)(b):

A head may refuse to disclose a record,

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[34] For this exemption to apply, the city must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting,

2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹²

[35] Each part of this three-part test must be met for a record to qualify for exemption under this section.

[36] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.¹³

[37] The first and second parts of the test for exemption under section 6(1)(b) require the city to establish that a meeting was held by the city and that it was properly held *in camera*.¹⁴

[38] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the question to ask is whether the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.¹⁵

[39] With respect to the third requirement, the wording of the provision and previous IPC decisions make clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the *in camera* meeting, not merely the subject of the deliberations.¹⁶

Representations

[40] With his representations, the appellant provides some context for his request. He has included several attachments relating to the termination of his employment with the city, and associated legal proceedings. This includes information regarding numerous trespass notices issued against him that precluded him from attending at city hall to discuss the circumstances of his dismissal.¹⁷ The appellant's representations as a whole are primarily concerned with what the appellant describes as the city's bad faith and the underlying reasons for what he says are unjust and unconstitutional prohibitions against

¹² Orders M-64, M-102 and MO-1248.

¹³ Order MO-1344.

¹⁴ Order M-102.

¹⁵ *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

¹⁶ Orders MO-1344, MO-2389 and MO-2499-I.

¹⁷ The trespass notices are restricted to the appellant's efforts to address issues relating to the termination of his employment and to not prevent him from attending municipal facilities as a constituent for other matters.

him. Although I have reviewed the appellant's representations in their entirety, I have only summarized those portions of his representations that are relevant to the issues that are properly before me in this appeal.

The city's representations

[41] The city submits that the records contain information that was discussed during *in camera* deliberations that took place in meetings held in the absence of the public, as permitted by section 239 of the *Municipal Act, 2001*. The city says that the meetings described in the records were held to deal with the following subjects authorized by section 239 of the *Municipal Act, 2001*:

- the October 3, 2011 closed meeting was held to deal with advice that is subject to solicitor-client privilege (authorized by section 239(2)(f) of the *Municipal Act, 2001*)
- the December 12, 2011 closed meeting dealt with litigation or potential litigation (section 239(2)(e) of the *Municipal Act, 2001*)
- the January 24, 2012 closed meeting dealt with the security or property of the municipality (section 239(2)(a) of the *Municipal Act, 2001*).

[42] The city submits that there were resolutions announcing the meetings to be held in absence of the public, that it has procedural bylaws that provide for closed meetings in accordance with the *Municipal Act, 2001* with which it complied, and that the contents of the *in camera* meetings are not shared with the public.

The appellant's representations

[43] The appellant submits that the meetings were unlawful and illegal, and that he should have access to any information about him that was discussed in them. The appellant submits that information discussed *in camera* should be recorded in minutes, and not in separate documents.

Analysis and findings

[44] For the following reasons, I find that records 1, 3, 5 and 7 are exempt under section 38(a), read with section 6(1)(b). I find that records 2, 4, and 6 are not exempt under section 6(1)(b), either on its own or read with section 38(a). I will therefore consider the city's alternative exemption claims for records 2, 4 and 6 at issues C and D, below.

Part 1: city council held a meeting

[45] The first part of the test for exemption under section 6(1)(b), on its own or as read with section 38(a), requires the city to establish that a meeting was held.

[46] The city submits that all of the meetings were held on the dates specified in the request. The appellant argues that the meetings were unlawful, but does not dispute that they took place.

[47] The records themselves support the city's position that city council held meetings on the dates identified in the appellant's request. I therefore find that the first part of the three-part test under section 6(1)(b), on its own, or as read with section 38(a) (as applicable), has been met for all of the records at issue.

Part 2: The Municipal Act, 2001 authorizes the holding of meetings in the absence of the public

[48] The second part of the test requires the city to establish that the meetings were properly held *in camera* (i.e. closed meetings in the absence of the public)¹⁸ by identifying the relevant statutory authority to support it. In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, I must consider whether the purpose of the meeting was to deal with the specific subject matter identified in the statute authorizing the holding of a closed meeting.¹⁹

[49] Under section 239(1) of the *Municipal Act, 2001*, all meetings must be open to the public unless they fall within the prescribed exceptions. Section 239(2) of the *Municipal Act, 2001*, sets out exceptions that authorize the convening of a meeting in the absence of the public.

[50] Based on my review of the parties' representations and the records themselves, I am satisfied that the city was authorized to hold the meetings identified in the request²⁰ *in camera* under section 239 of the *Municipal Act, 2001*. Specifically, I find that the *in camera* meetings that are the subject of the records at issue were authorized under sections 239(2)(a), (e) and (f) to discuss security of city property, litigation or potential litigation, and advice that may be subject to solicitor-client privilege, respectively, thereby satisfying part two of the test under section 6(1)(b), on its own or as read with section 38(a) (as applicable), for all the records at issue.

Part 3: disclosure of the records would reveal the actual substance of the deliberations of the meetings.

[51] With respect to the third requirement set out above, the wording of the provision and previous IPC decisions establish that in order to qualify for exemption under section 6(1)(b), on its own or as read with section 38(a), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) specifically requires that disclosure of the records would reveal the actual *substance of deliberations* that took place at the city's closed meetings, not merely the *subject* of the

¹⁸ Order M-102.

¹⁹ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

²⁰ On October 3 and December 12, 2011 and January 24, 2012.

deliberations.²¹

Records 1, 3, 5 and 7

[52] Based on my review of the records and the city's representations, I am satisfied that records 1, 3, 5 and 7 contain information that, if disclosed, would reveal the substance of deliberations of council held in a closed meeting. I therefore find that the third part of the section 6(1)(b) test has therefore been met for these records.

[53] Records 1 and 5²² set out a recommendation discussed during the meeting that was not carried. Record 3 is an email sent to city council that describes in detail the reasons for the October 3, 2011 closed meeting and details of the matter to be discussed. I have not summarized those reasons in this order, because to do so would disclose the contents of the records. However, I am satisfied from my review of records 1, 3 and 5 that their disclosure would reveal the substance of council's deliberations in the October 3, 2011 closed meeting.

[54] I also find that record 7 is exempt under section 38(a), read with section 6(1)(b). Record 7 is a report to council about security concerns addressed during the December 12, 2011 *in camera* meeting, as well as other security-related matters arising from it to be considered at the January 24, 2012 *in camera* meeting.

[55] Record 7 was prepared by a city employee (the director of human resources) for the mayor and city council after the December 12, 2011 *in camera* meeting, and sets out recommendations for discussion at the January 24, 2012 *in camera* meeting. Based on the city's representations and the records, the January 24, 2012 *in camera* meeting was called to discuss, among other things, security of municipal property as authorized by section 239(a) of the *Municipal Act, 2001*. The security measures proposed in record 7 are consistent with the purpose for which the closed meeting was called. Record 7 also includes, as an attachment, a recommendation that was carried by council based on the matters discussed in record 7 itself. I find that disclosure of record 7, which includes the attached recommendation on which council voted *in camera* on January 24, 2012, would reveal, in detail, the substance of council's deliberations in both the December 12, 2011 and January 24, 2012 closed meetings.

[56] I therefore find that the third part of the three-part test for exemption has been met for records 1, 3 5 and 7, and that records 1, 3, 5 and 7 are exempt under section 38(a), read with section 6(1)(b) of the *Act*.

Records 2, 4 and 6

[57] I find that the third part of the test to establish section 6(1)(b), on its own or as read with section 38(a) (as applicable), has not been met for records 2, 4 and 6.

²¹ Orders MO-1344, MO-2389 and MO-2499-I.

²² As noted above, record 5 is a copy of portion of record 1.

[58] Record 2 is a report to council that simply announces the October 3, 2011 *in camera* meeting, with location and time, and the subject for discussion. Although it identifies the appellant by surname as a subject for discussion, based on my review, record 2 does not reveal the actual substance of the deliberations of the *in camera* meeting. I therefore find that record 2 does not meet the three-part test for exemption under section 38(a), read with section 6(1)(b), of the *Act*.

[59] I also find that records 4 and 6 do not meet the three-part test for exemption under section 6(1)(b). Records 4 and 6 are resolutions passed by council in advance of, and announcing, closed meetings to be held on December 12, 2011 and January 24, 2012. The subjects to be considered *in camera* are identified by relevant sections of the *Municipal Act, 2001* as matters relating to the acquisition and disposition of certain lands, advice that the city claims is subject to solicitor-client privilege, security of property and litigation, none of which identify the appellant. Based on my review of records 4 and 6, I find that they simply identify subjects to be discussed *in camera*, and that disclosure of records 4 and 6 would not reveal the actual substance of the deliberations undertaken during the closed meetings themselves.

[60] I therefore find that records 2, 4 and 6 are not exempt under section 38(a) read with section 6(1)(b), or under section 6(1)(b) alone (as applicable).

[61] I will next consider whether records 2, 4 and 6 are exempt under sections 38(a) and/or section 7.

Issue C: Do the discretionary exemptions in sections 38(a) and/or 7(1) (advice or recommendations) apply to the records?

[62] Because I have found that records 1, 3, 5 and 7 are exempt under section 38(a) read with section 6(1)(b), the following analysis relates only to the records remaining at issue: records 2, 4 and 6.

[63] Because of my findings about whether the records contain the appellant's personal information, I must review records 4 and 6 under section 7(1), but I must consider the application of section 7(1) to record 2 through the lens of section 38(a).

[64] Section 38(a) allows the city to withhold records if they would be exempt under section 7(1) of the *Act*. Section 7(1) is also discretionary and allows the city to refuse to disclose a record "where the disclosure would reveal advice or recommendations of an officer or employee of an institution."²³

[65] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly

²³ Section 7(1) states, in its entirety, that: "A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution."

advise and make recommendations within the deliberative process of government decision-making and policy-making.²⁴

[66] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[67] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁵ "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[68] Advice or recommendations may be revealed in two ways:

[69] the information itself consists of advice or recommendations

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁶
- The application of section 7(1) is assessed as of the time the public servant prepared the advice or recommendations. Information such as factual or background information has been found not to qualify as advice or recommendations.²⁷

Representations

The city's representations

[70] Although the city claims that records 2, 4 and 6 are exempt under section 38(a), read with section 7 or on its own, the city has not explained in its representations why these exemptions would apply. The city's representations acknowledge that some of the records do not contain advice or recommendations, and focus on the application of section 38(a) read with section 7(1) to records 3 and 7, which I have already found to be exempt under section 38(a) read with section 6(1)(b).

The appellant's representations

[71] The appellant's representations do not challenge that advice or recommendations

²⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁵ See above at paras. 26 and 47.

²⁶ Order P-1054.

²⁷ Order PO-2677.

were given, although the appellant objects that these were not made available to him for review, and submits that council made decisions based "solely on the purported facts as presented by staff which would undoubtedly support the entrenched position of members of Council."

Analysis and findings

[72] Based on my review of the materials before me, including the records themselves, I find that neither section 38(a) read with section 7(1), nor section 7(1) on its own, applies to records 2, 4 or 6.

[73] As I have already described above, records 2, 4 and 6 simply announce *in camera* meetings to be held by council. They identify the date, time, place and subjects for consideration. Records 2, 4 and 6 do not contain any advice or recommendations as discussed above and I find that they are therefore not exempt under section 7(1).

[74] I will next consider the city's claim that records 2, 4 and 6 are exempt under section 38(a) read with section 12, or under section 12 on its own, as applicable.

Issue D: Do the discretionary exemptions in sections 38(a) and/or 12 (solicitor-client privilege) apply to the records?

[75] Above I have found that records 1, 3, 5 and 7 are exempt under section 38(a) read with section 6(1)(b). Accordingly, the following analysis relates only to the records remaining at issue: records 2, 4, 6.²⁸ Record 2 is an internal report announcing the October 3, 2011 closed meeting, while records 4 and 6 are resolutions made in an open session of council announcing the December 12, 2011 and January 24, 2012 closed meetings. All three records set out the dates, times, locations and subject matter to be discussed at each meeting.

[76] Because of my findings that record 2 contains the appellant's personal information but records 4 and 6 do not, I must review record 2 under section 38(a) read with section 12, and records 4 and 6 under section 12 alone.

[77] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by

²⁸ I note that the city made arguments that records 1, 3 and 5 are subject to solicitor-client privilege because they discuss a resolution which, if passed, would result in potential litigation. However, because I have already found that records 1, 3 and 5 are exempt under section 38(a) read with section 6(1)(b), I need not consider whether they are also exempt under section 38(a) read with section 12.

an institution for use in giving legal advice or in contemplation of or for use in litigation.

[78] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

[79] The city takes the position that the records are subject to common law privilege. At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client privilege communication privilege and litigation privilege.

[80] Solicitor-client privilege communication privilege protects *direct* communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²⁹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³⁰ The privilege covers the document containing legal advice, the request for legal advice, and also information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³¹

[81] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.³² Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.³³ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.³⁴ The litigation must be ongoing or reasonably contemplated.³⁵

[82] The branch 2 exemption is a statutory privilege that applies where the records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons.

²⁹ *Descôteaux v. Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁰ Orders PO-2441, MO-2166 and MO-1925.

³¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

³² *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

³³ *Ontario (Attorney General v. Ontario) (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

³⁴ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

³⁵ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.). See also *Blank v. Canada (Minister of Justice)*, cited above.

[83] For the reasons that follow, I find that records 2, 4 and 6 are not exempt under section 38(a), read with section 12, or section 12 on its own (as applicable), and I will order the city to disclose them to the appellant.

Representations

[84] The city submits that city staff could not commence legal action without council's permission, so that the records were, in part, prepared in contemplation of litigation because litigation was raised as a possible response to the appellant. The city submits that the recommendation from the October 3, 2011 meeting (records 1 and 5) "had to do with solicitor client privilege" and that its passing would have resulted in possible litigation and therefore the retainer of legal counsel. The city's representations do not provide reasons why records 2, 4 and 6 are solicitor-client privileged.

[85] The appellant's representations do not address section 12.

Analysis and findings

[86] As I have already noted above, record 2 identifies the appellant by his surname. It is an internal report submitted by the city's chief administrative officer to the mayor and council notifying them of the *in camera* meeting to be held on October 3, 2011, and setting out the meeting's location, time, and subject. Record 2 contains no mention or discussion of communication with legal counsel or of contemplated litigation. I find that neither branch 1 nor 2 solicitor-client privilege applies to record 2.

[87] Similarly, records 4 and 6 – which do not identify the appellant – are resolutions made in open session of council announcing *in camera* meetings (to be held on December 12, 2011 and January 24, 2012) to discuss various subjects that I have already found were authorized to be held in a closed meeting by section 239 of the *Municipal Act, 2001*. Although the resolutions in records 4 and 6 identify sections 239(e) and (f) of the *Municipal Act, 2001*, which authorize discussion of potential litigation and advice that is subject to solicitor-client privilege as subjects for discussion *in camera*, it is clear from the face of the records that these are simply statutory references describing the relevant sections, and that these resolutions were made in an open meeting of council. As a result, I have no basis on which to conclude that they are or were intended to be confidential, that they involve discussion with the city's legal counsel or direct communication with a lawyer regarding solicitor-client privileged matters, or that they were made in relation to contemplated or actual litigation.

[88] There is also no evidence from the records themselves that they contain communication between a lawyer and client, that they were prepared for the dominant purpose of litigation or contemplated litigation, or that they were "prepared by or for counsel employed or retained by [the city] for use in giving legal advice or in contemplation of or for use in litigation."

[89] I therefore find that neither branch 1 nor 2 solicitor-client privilege applies to

records 2, 4 or 6, and that neither section 38(a) read with section 12, nor section 12 on its own (as applicable), applies to records 2, 4 or 6.

[90] The city has made no further alternative exemption claims over these records. I will therefore order the city to disclose records 2, 4 and 6 to the appellant.

Issue E: Should the city's exercise of discretion under section 38(a) be upheld?

[91] In this part, I will consider the city's exercise of discretion in denying access to records 1, 3, 5 and 7, which I have found to be exempt under section 38(a), read with section 6(1)(b) of the *Act*.

[92] The section 38(a) exemption is discretionary. It permits the city to disclose information despite that fact that it could withhold it. In deciding whether to grant or deny access, the city must exercise its discretion. On appeal, I may determine whether the city failed to do so.

[93] In addition, I may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[94] While I may send the matter back to the institution for an exercise of discretion based on proper considerations,³⁶ I may not substitute my own discretion for that of the institution.³⁷

Relevant considerations

[95] Where access is denied under section 38(a), the city must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. Other relevant considerations may include, but are not limited to, those listed below:³⁸

- the purposes of the *Act*, including the principles that information should be available to the public
- exemptions from the right of access should be limited and specific

³⁶ Order MO-1573.

³⁷ Section 43(2).

³⁸ Orders P-344 and MO-1573.

- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

Representations

The city's representations

[96] The city submits that it considered that the information sought is not public information, but rather is information created for the purpose of discussion in *in camera* meetings. The city submits that it considered that this type of information is not disseminated because it relates to council's decisions properly made in the absence of the public. The city also says it considered that, "[a]lthough the appellant's information is shared as part of the lead up to the in-camera meetings," confidential information discussed in camera in the absence of the public should not be shared. The city says that it considered that, although the appellant's personal information is contained in the records, *in camera* meetings are not public and that the information discussed in them is accordingly not released in response to access requests. The city also says it considered that disclosure of information from *in camera* decision-making could create a precedent for others seeking information from closed meetings.

The appellant's representations

[97] The appellant submits that council and the city's administration have acted in bad faith toward him and have thwarted his "persistent search for truth and transparency." The appellant says that the city failed to consider that his relationship with the city has become fractured and dysfunctional because of decisions undertaken against him, and that disclosure of what the appellant describes as the city's "hidden agenda" against him would lead to public confidence in and greater respect for the city.

Analysis and findings

[98] I have reviewed the parties' representations and the records, and find that the city did not err in exercising its discretion to deny access to records 1, 3, 5 and 7. As noted earlier, the appellant's representations focus on his fractured relationship with the city, and the underlying reasons for trespass notices against him that barred him from attending at city hall to address the issue of his termination, the outcome of arbitration,

and later, the reasons for the trespass notices themselves.

[99] It is apparent from the city's representations and the records themselves that the city considered its authority to hold meetings in the absence of the public, and that the city considered the relevant sections of the *Municipal Act, 2001* allowing it to do so for certain specified reasons. In the circumstances, the appellant has not provided me with sufficient evidence to demonstrate that the city withheld the records at issue in this appeal in bad faith or for an improper purpose.

[100] I therefore uphold the city's exercise of discretion to deny access to records 1, 3, 5 and 7 under section 38(a) read with section 6(1)(b) of the *Act*.

Issue F: Did the city conduct a reasonable search for records?

[101] The appellant believes that additional records exist that are responsive to his request.

[102] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.³⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. Otherwise, I may order the institution to conduct another search for records.

[103] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁴⁰

[104] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁴¹ that is, records that are "reasonably related" to the request.⁴²

[105] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁴³

Representations

The city's representations

[106] The city submits that the City Clerk (clerk) and the FOI, Records and Elections

³⁹ Orders P-85, P-221 and PO-19544-I.

⁴⁰ Order MO-2246.

⁴¹ Orders P-624 and PO-2559.

⁴² Order PO-2554.

⁴³ Orders M-909, PO-2469 and PO-2592.

Coordinator (records coordinator) searched for responsive records. The city says that they searched files in the legal department, the former clerk's personal digital file system and the current departmental drive. The city says that, in order to cross-reference their findings, the clerk and records coordinator both searched the former clerk's digital filing system. The city submits that physical and digital files were searched.

[107] The city submits that the appellant included specific dates and types of records in his request, so that responsive records would have been easy to find.

[108] The city submits that, although the appellant assumes further discussion should have been documented in the requested closed session meetings, the city adhered to section 228(a) of the *Municipal Act, 2001*, which requires the clerk to "record, without note or comment, all resolutions, decisions and other proceedings of the council." As a result, no additional information was documented to meeting minutes.

The appellant's representations

[109] The appellant's representations do not directly address the reasonableness of the city's searches for responsive records, stating only that the city did not ask the appellant to clarify his request and that more detailed notations of meeting minutes should exist. The appellant submits that the city has not responded to his "multiple requests... submitted over the course of many years." The appellant says that the city's response has been to issue trespass orders against him, their non-disclosure, and closed meetings are the reasons "we are at this point."

Analysis and findings

[110] I am satisfied that the city's search for responsive records was reasonable.

[111] As mentioned above, the city is not required to prove with certainty that further records do not exist in order to satisfy the requirements of the *Act*. It must only show that it made a reasonable effort to locate responsive records. Based on the evidence before me, I find that it has. The city's representations demonstrate that experienced employees, knowledgeable in the records related to the subject matter of the appellant's request, made reasonable efforts to locate responsive records. The city searched relevant databases and physical files for responsive records, and searched by date and type of record identified by the appellant. Where additional notations in meeting minutes do not exist, the city has provided a reasonable explanation.

[112] The appellant was asked to provide support in his representations for his belief that additional responsive records exist. The appellant did not provide any reasonable basis on which I could conclude that additional records responsive to this access request exist. In the circumstances, I am not satisfied that another search would yield more responsive records.

[113] I therefore find that the city's search for responsive records was reasonable and I uphold it.

ORDER:

1. I order the city to disclose records 2, 4 and 6 to the appellant in their entirety, by January 9, 2023 but not before January 4, 2023.
2. I uphold the city's decision to deny access to records 1, 3, 5 and 7.
3. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____
Jessica Kowalski
Adjudicator

_____ November 30, 2022